

Applying Court of Appeal rules

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Introduction

In *Deepak Jaikishan v A SantamilSelviAlau*(**1**) the Federal Court examined the following two questions of law:

- whether an objection pertaining to the unlawfulness of a notice of appeal could, as a matter of procedural law, be undertaken by way of a mere preliminary objection; and
- whether the filing of a single notice of appeal in respect of a decision on eight separate and distinct interlocutory applications complied with the procedural rules set out in the Rules of the Court of Appeal 1994.

The Federal Court decision provides an important reminder that compliance with the Rules of the Court of Appeal is paramount and illustrates their appropriate application.

Facts

The plaintiffs filed a writ action before the high court in order to claim damages against nine defendants for the tort of conspiracy to cause injury by unlawful means. All nine defendants filed separate applications under Order 18 Rule 19 of the Rules of Court 2012 to strike out the plaintiffs' writ. The high court subsequently allowed these applications on the grounds that the plaintiffs had failed to plead material facts that would sustain their claim.

Dissatisfied with the high court decision, the plaintiffs appealed to the Court of Appeal, but filed only one notice of appeal against the high court's decision.

In view of this, all of the defendants – except the eighth defendant – filed separate notices to strike out the plaintiffs' notice of appeal on the grounds that the notice of appeal was unlawful, as the plaintiffs had failed to file separate notices of appeal against the high court's decision.

The Court of Appeal allowed the defendants' applications and the plaintiffs' notice of appeal was subsequently struck out. However, given that the eighth defendant did not file a notice of motion, the Court of Appeal held that the plaintiffs' notice of appeal against the eighth defendant was still valid. As such, the plaintiffs' appeal against the eighth defendant was heard before another panel of the Court of Appeal.

At the preliminary stage of the hearing, a preliminary objection was raised by the eighth defendant, which argued that there was no proper appeal before the Court of Appeal as the plaintiffs' notice of appeal was unlawful; hence, an order to dismiss the plaintiffs' appeal should be granted.

Nonetheless, the eighth defendant's preliminary objection was dismissed by the Court of Appeal on the grounds that it should have filed a proper application by way of notice to strike out the plaintiffs' appeal.

Dissatisfied with the Court of Appeal's decision, the eighth defendant filed leave to appeal to Federal Court, which leave was granted based on the two aforementioned questions of law.

Decision

For ease of reference, the parties will be referred to as they were in the high court.

The Federal Court allowed the appeal by the eighth defendant on the following grounds.

Preliminary objection allowed to prevent substantial miscarriage of justice

The Federal Court referred to both Rules 3 and 27 of the Rules of the Court of Appeal:

"Rule 3: A Court or Judge shall now allow any preliminary objection by any party only on the ground of non-compliance of any of these Rules unless the Court or Judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice."

"Rule 27: All applications to the Court of Appeal must be made by way of a motion as provided for in Form 4 in the First Schedule to RCA 1994. It is trite that parties to a proceeding must file by way of a notice of motion for any application that needs to be decided by the Court of Appeal."

Having read Rules 3 and 27 as a whole, the Federal Court was of the view that the two provisions imply that a preliminary objection on the grounds of non-compliance with any of the provisions in the Rules of the Court of Appeal could not be allowed. However, this is not a blanket prohibition. In the event that non-compliance with a provision of the Rules of the Court of Appeal results in a substantial miscarriage of justice, a preliminary objection may be allowed.

In the case at hand, as the Court of Appeal had deemed the plaintiffs' notice of appeal to be unlawful and defective, there was no proper appeal. According to the Federal Court, to allow the case to proceed solely against the eighth defendant would cause a substantial miscarriage of justice. Further, given that the plaintiffs' cause of action against the nine defendants – including the eighth defendant – had been dismissed or struck out, the eighth defendant should not have to respond to the plaintiffs' case on its own. Thus, the eighth defendant's preliminary objection before the Court of Appeal should have been allowed, as it would have prevented a substantial miscarriage of justice against the eighth defendant.

'Shall' denotes mandatory compliance

The Federal Court also noted that Rule 5(3) of the Rules of the Court of Appeal provides that a notice of appeal "shall" substantially be in Form 1 in the First Schedule. The word 'shall' requires the parties to comply with the provision under the rule.

In light of this, the Federal Court was of the view that the plaintiffs should have filed separate notices of appeal against the high court's decision in allowing the defendants' separate applications to strike out the plaintiffs' writ.

A reference to a Court of Appeal decision in *A SantamilSelvi a/l Alau Malay v Dato' Seri Mohd Najib Tun Abdul Razak*(2) was made, in which the Court of Appeal had held, among other things, as follows:

"But where the appeal is against more than one decision arising from the separate interlocutory application made by different parties to the action, it is incumbent on the appellant to set out the details of the decisions in the notice of appeal."

The Federal Court concurred with the Court of Appeal's view in the above case and held that the main purpose of Rule 5(3) of the Rules of the Court of Appeal is to allow parties to answer the opposing party's case.

The Federal Court noted that each of the defendants had filed separate applications to strike out the plaintiffs' statement of claim, each of which was supported by different grounds and had different filing dates and counsels. Therefore, by way of the procedural rules, there were in fact eight separate orders made by the high court, although the court delivered a

single judgment encompassing the eight applications. As such, the filing of a single notice of appeal by the plaintiffs in respect of a decision on eight separate and distinct interlocutory applications did not comply with the Rules of the Court of Appeal.

Comment

The Federal Court's decision acts as a useful guideline and – more importantly – as a reminder for future cases, as it helps lawyers to better understand the application of the Rules of the Court of Appeal and the significance of compliance therein. However, the Federal Court's decision has also showed that the rules will not be rigidly applied when compliance may create a substantial miscarriage of justice.

In conclusion, parties should always be mindful of the procedural rules as failure to comply may result in the dismissal of an appeal, as in the case at hand. That said, the courts will not rigidly apply the rules, having considered that their purpose is to prevent substantial miscarriages of justice.

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Endnotes

(1) [2017] 5 CLJ 641.

(2) [2015] 4 CLJ 1016.

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